

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE LITIGATION)

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO ALL
CLASS ACTIONS
01-CV-12257-PBS AND 01-CV-339

[MODIFIED AND CORRECTED PROPOSED VERSION 2]
CONSOLIDATED ORDER RE: MOTION FOR CLASS CERTIFICATION

_____, 2006

Saris, U.S.D.J.

Plaintiffs have moved, pursuant to Fed. R. Civ. P. 23, for an order certifying a class in this action. Having considered the submissions of the parties and the record in this case, IT IS HEREBY ORDERED that plaintiffs' motion for class certification is GRANTED IN PART and DENIED IN PART as to the claims asserted in the Third Amended Master Consolidated Class Action Complaint ("TAMCAC"), as follows:

I. CLASSES AND SUBCLASSES CERTIFIED

The Court certifies the following Classes:

1. Class 1: Medicare Part B Co-Pay Class.

a. Class Definition:

All natural persons nationwide who made a co-payment based on AWP, or who have incurred a currently enforceable obligation to make a co-payment, for a Medicare Part B covered Subject Drug that was manufactured by AstraZeneca, the BMS Group, the GSK

¹ The Subject Drugs are identified in the Table of Subject Drugs found at the end of this Order.

Group, or the Johnson & Johnson Group.² Excluded from the Class are those who made flat co-pays; and the residents of the states of Alabama, Georgia, Iowa, Kentucky, Louisiana, Mississippi and Montana (where consumer protection statutes do not permit class actions).

b. The Court certifies four Subclasses corresponding to each of the defendant groups

c. The Court also certifies the following plaintiffs as Class 1 Representatives of these Subclasses: Leroy Townsend (Astra); Reverend David and Susan Ruth Aaronson (BMS, GSK); Joyce Howe individually and on behalf of the Estate of Robert Howe (Astra); James and Teresa Shepley (J&J, Astra); and Larry Young individually and on behalf of the Estate of Patricia Young (J&J). Consistent with the Court's February 24, 2004, Memorandum and Order, the Representative of a Subclass need only have paid or reimbursed for one of the Subject Drugs manufactured or marketed by a defendant group.

d. The consumer protection act of each state shall apply to these Subclasses. Specifically, the Medicare Co-pay Class is certified for claims under the following statutes: (a) Alaska Stat. Code § 40.50.471, *et seq.*; (b) Ariz. Rev. Stat. § 44-1522, *et seq.*; (c) Ark. Code § 4-88-101, *et seq.*; (d) Cal. Bus. & Prof. Code §§ 17200, *et seq.*, 1770; (e) Colo. Rev. Stat. § 6-1-105, *et seq.*; (f) Conn. Gen. Stat. § 42-110b, *et seq.*; (g) 6 Del. Code § 2511, *et seq.*; (h) D.C. Code § 28-3901, *et seq.*; (i) Fla. Stat. § 501.201, *et seq.*; (j) Haw. Rev. Stat. § 480, *et seq.*; (k) Idaho Code § 48-601, *et seq.*; (l) 815 ILCS § 505/1, *et seq.*; (m) Ind. Code Ann. § 24-5-0.5.1, *et seq.*; (n) Kan. Stat. § 50-623, *et seq.*; (o) Md. Com. Law Code § 13-101, *et seq.*; (p) Mass. Gen. L. Ch. 93A, *et seq.*; (q) Mich. Stat. § 445.901, *et seq.*; (r) Minn. Stat. § 325F.67, *et seq.*; (s) Mo. Rev. Stat. § 407.010, *et seq.*; (t) Neb. Rev. Stat. § 59-1601, *et seq.*; (u) Nev. Rev. Stat. § 598.0903, *et seq.*; (v) N.H. Rev. Stat. § 358-A:1, *et seq.*; (w) N.J. Stat. Ann. § 56:8-1, *et seq.*;

² These "groups" are defined in the TAMCAC.

(x) N.M. Stat. Ann. § 57-12-1, *et seq.*; (y) N.Y. Gen. Bus. Law § 349, *et seq.*;
 (z) N.C. Gen. Stat. § 75-1.1, *et seq.*; (aa) N.D. Cent. Code § 51-15-01, *et seq.*;
 (bb) Ohio Rev. Stat. § 1345.01, *et seq.*; (cc) Okla. Stat. tit. 15 § 751, *et seq.*;
 (dd) Or. Rev. Stat. § 646.605, *et seq.*; (ee) 73 Pa. Stat. § 201-1, *et seq.*; (ff) R.I.
 Gen. Laws. § 6-13.1-1, *et seq.*; (gg) S.C. Code Laws § 39-5-10, *et seq.*; (hh) S.D.
 Code Laws § 37-24-1, *et seq.*; (ii) Tenn. Code § 47-18-101, *et seq.*; (jj) Tex. Bus.
 & Com. Code § 17.41, *et seq.*; (kk) Utah Code Ann. § 13-1 1-1, *et seq.*; (ll) Vt.
 Stat. Ann. tit. 9, § 245 1, *et seq.*; (mm) Va. Code § 59.1-196, *et seq.*; (nn) Wash.
 Rev. Code § 19.86.010, *et seq.*; (oo) W. Va. Code § 46A-6-101, *et seq.*; (pp) Wis.
 Stat. § 100.20, *et seq.*; and (qq) Wyo. Stat. § 40-12-100, *et seq.* The Court finds
 that plaintiffs have complied with the notice provisions of all consumer protection
 acts requiring such notice.

e. Class 1 is certified pursuant to Fed. R. Civ. P. 23(b)(3) for damage
 claims.

f. The time frame for this Class is January 1, 1991 to January 1,
 2005.

2. Class 2: Third-Party Payor MediGap Supplemental Insurance Class.

a. Class Definition:

All Third-Party Payors that made reimbursements for a
 Medicare Part B covered Subject Drug prescribed in the
 State of Massachusetts that was manufactured by
 AstraZeneca, the BMS Group, the GSK Group, the Johnson
 & Johnson Group, or the Schering Plough Group.

b. The Court certifies five Subclasses corresponding to each of the
 defendant groups.

c. The Class representatives for Class 2 are: Blue Cross Blue Shield
 of Massachusetts and Sheet Metal Workers Health Fund.

d. The claims for this Class are certified under Mass. Gen. Laws ch. 93A for the purposes of a test case, after which the Court will examine the issue of a broader certification.

e. The Class is certified pursuant to Fed. R. Civ. P. 23(b)(3) for damage claims.

f. The time period for this class is January 1, 1991 to January 1, 2005.

3. **Class 3: Consumer and Third-Party Payor Class for Medicare Part B Drugs Outside of the Medicare Context.**

a. Class Definition:

All natural persons and Third-Party Payors that made payments or reimbursements, or who have a currently enforceable obligation to make a payment or reimbursement, for Subject Drugs prescribed in the Commonwealth of Massachusetts and manufactured by AstraZeneca, the BMS Group, the GSK Group, the Johnson & Johnson Group, or the Schering Plough Group, where such payments or reimbursements were based on contracts that expressly use AWP as a pricing standard. Included within this Class are individuals who paid coinsurance (*i.e.*, co-pays proportional to the reimbursed amount) for a Subject Drug, where such coinsurance was based upon use of AWP as a pricing standard. Excluded from this Class 3 are any payments or reimbursements for generic drugs that are based on MAC and not AWP.

b. The Court certifies five Subclasses corresponding to each of the defendant groups.

c. The Class is certified pursuant to Fed. R. Civ. P. 23(b)(3) for damage claims and (b)(2) for injunctive purposes.

d. The class representatives for Class 3 are: Blue Cross Blue Shield of Massachusetts, ~~Sheet Metal Workers Health Fund~~, Pipefitters Local 537 Trust Funds, and Health Care for All for the (b)(2) Class.

e. The claims for this Class are certified under Mass. Gen. Laws ch. 93A for the purposes of a test case, after which the Court will examine the issue of a broader certification.

II. CLASSES NOT CERTIFIED

1. With respect to Classes 2 and 3, the Court declines at this time to certify these Classes under the consumer protection laws of states other than Massachusetts. However, this denial is without prejudice and does not affect the statute of limitations, which remains tolled in those states that permit equitable tolling, until such time as the Court makes a final ruling. The Court intends the trial of the Massachusetts Class to provide important information for an accurate evaluation of claims under other states' laws. Accordingly, at a later date plaintiffs can renew their motion to certify Classes 2 and 3 for purposes of the application of the consumer protection acts of other states.

2. The Court declines to certify a Class of Consumers and Third-Party Payors who made payments or reimbursements for self-administered drugs not appearing in the appended Table of Subject Drugs to the extent monetary claims were sought for those drugs (*see* Memorandum Opinion of August 16, 2005). This declination thus excludes from any class self-administered drugs ("SADs") except to the extent such SADs (1) are covered under Medicare Part B, and (2) appear in the Table of Subject Drugs. The drugs certified in Class 3 are limited to physician-administered drugs that appear in the appended Table of Subject Drugs.

III. MISCELLANEOUS

1. To the extent that it is not inconsistent herewith, this Court's August 16, 2005, Memoranda and Order Re: Motion for Class Certification is incorporated herein.

2. Excluded from these Classes are the defendants herein; any subsidiaries or affiliates of defendants; the officers and directors of defendants during the Class Period; members of the defendants' immediate families; any person, firm, trust, corporation, officer, director or any individual or entity in which any defendant has a controlling interest or which is

related to, or affiliated with, any of the defendants; the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded parties and governmental entities.

3. Pursuant to Fed. R. Civ. P. 23(g), the Court appoints the following firms as Co-Lead Counsel: Hagens Berman Sobol Shapiro LLP; Spector Roseman & Kodroff, P.C.; Hoffman & Edelson; The Wexler Firm LLP; and Kline & Specter.

4. Co-Lead Counsel for Plaintiffs shall prepare and submit within 30 days from the date of this Order a proposed form and method of notice to be sent to members of the Classes and a supporting motion. Defendants may file any comments to the notice within 15 days, and Plaintiffs may reply 15 days thereafter. The motion and supporting memorandum shall not exceed 20 pages; any response by defendants shall not exceed 10 pages; and the reply shall not exceed 5 pages. There will be no sur-replies, supplemental replies, letter briefs, motions to strike or similar subterfuges for more briefing opportunity. There shall be no individual briefs by each defendant. The parties shall be reasonable with respect to any appendices.

5. The “Together Rx” claims are not certified because they are dismissed without prejudice by the filing of the TAMCAC.

6. The Court retains the discretion under Rule 23 to modify this Order.

PATTI B. SARIS
United States District Judge

TABLE OF SUBJECT DRUGS

AZ NDC List

NDC	Description
00186198804	PULMICORT RESPULES 60 mls 2 X 30.25mg/2mL
00186198904	PULMICORT RESPULES 60 mls 2x30 .5mg/2mL
00310096036	Zoladex 3.6mg 1x1EA Depot
00310096130	Zoladex 10.8mg 1x1EA Depot
00310095130	Zoladex 10.8mg 1x1EA Depot
00310095036	Zoladex 3.6mg 1x1EA Depot

BMS NDC List

NDC	Description
00015301026	BLENOXANE INJ 15 UNIT VHA
00015301020	BLENOXANE INJ 15 UNIT VL
00015306326	BLENOXANE INJ 30 UNIT VHA
00015306301	BLENOXANE INJ 30 UNIT VL
00590032435	COUMADIN INJ 5MG VIAL
00015053910	CYTOXAN 100MG LYOPH W/CYT
00015054812	CYTOXAN 1G 6X50ML VHA+
00015054810	CYTOXAN 1GM LYOPH W/CYTOG
00015054610	CYTOXAN 200MG LYOPH W/CYT
00015054912	CYTOXAN 2G 6X100ML VHA+
00015054910	CYTOXAN 2GM LYOPH W/CYTOG
00015054710	CYTOXAN 500MG LYOPH W/CYT
00015050001	CYTOXAN FOR INJ 100 MG
00015050041	CYTOXAN INJ 100MG
00015050641	CYTOXAN INJ 1X2GM VIAL
00015050241	CYTOXAN INJ 1X500MG VIAL
00015050141	CYTOXAN INJ 200MG
00015054712	CYTOXAN LYO 500MG VL VHA
00015054741	CYTOXAN LYOPH 500MG
00015053941	CYTOXAN LYOPHILIZED 100MG
00015054841	CYTOXAN LYOPHILIZED 1GM
00015054641	CYTOXAN LYOPHILIZED 200MG
00015054941	CYTOXAN LYOPHILIZED 2GM
00015050541	CYTOXAN PINJ 1X1G VIAL
00015050303	CYTOXAN TABLETS 50 MG
00015050302	CYTOXAN TABLETS 50MG
00015050401	CYTOXAN TABS 25MG
00015050301	CYTOXAN TABS 50MG
00015050348	CYTOXAN TABS 50MG
00015340420	ETOPOPHOS 100MG VIAL
00015321429	PARAPLATIN 10X15ML VHA+
00015321529	PARAPLATIN 10X45ML VHA+
00015321329	PARAPLATIN 10X5ML VHA+
00015321410	PARAPLATIN 150MG LYOPH CY
00015321430	PARAPLATIN 1X150MG LYO VL
00015321530	PARAPLATIN 1X450MG LYO VL
00015321510	PARAPLATIN 450MG VL W/CYT
00015321330	PARAPLATIN 50MG LYOPHILIZ
00015321310	PARAPLATIN 50MG W/CYTO
00015335322	RUBEX 100 MG LYOPHILIZED
00015335324	RUBEX 100MG IMMUNEX LABEL
00015335124	RUBEX 10MG IMMUNEX LABEL
00015335122	RUBEX 10MG LYOPHILIZED
00015335224	RUBEX 50MG IMMUNEX LABEL
00015335222	RUBEX 50MG LYOPHILIZED
00015347630	TAXOL 100MG INJ MULTIDOSE
00015347627	TAXOL 100MG SEM-SYN VIAL
00015347620	TAXOL 100MG/16.7ML VHA+ L

00015347911	TAXOL 300MG/50ML VIAL
00015345620	TAXOL 30MG CONC FOR INJ
00015347530	TAXOL 30MG INJ MULTIDOSE
00015347527	TAXOL 30MG SEM-SYN VIAL
00015347520	TAXOL 30MG/5ML VHA+ LABEL
00015309510	VEPESID 100MG VIAL W/CYTO
00015309530	VEPESID 100MG VL W/O CYTO
00015306224	VEPESID 1G 50ML VIAL VHA+
00015306220	VEPESID 1GM/50ML
00015306120	VEPESID 500MG
00015306124	VEPESID 500MG 25ML VL VHA
00015309145	VEPESID 50MG CAPSULES
00015309520	VEPESID INJ 100MG/5ML
00015308420	VEPESID INJ 150MG/7.5ML

GSK NDC List

NDC	Description
00173013093	ALKERAN I.V. INJ 50 MG
00173004535	ALKERAN TAB 2MG 50S
00173044902	IMITREX INJ 0.5ML 12MG/ML 5S VIALS
00173044901	IMITREX INJ 12MG/ML 0.5ML 2S PFLD SRNG
00173044903	IMITREX INJ 12MG/ML 0.5ML 2S KIT,SELFDOSE
00173047900	IMITREX INJ 12MG/ML STAT DOSE KIT
00173047800	IMITREX INJ 12MG/ML STAT DOSE RFL 2'S
00173403291	IMITREX SELFDOSE SYSTEM SELFDOSE UNIT/C
00173408367	ITMD ZOVIRAX STERILE POWDER 1000MG (BW9
00029415105	KYTRIL 1 MG TABS 20'S SUP
00029415139	KYTRIL 1MG TABS 2'S
00029415201	KYTRIL 1MG/ML INJECTION 4ML VIAL
00029414975	KYTRIL INJ SGL DOSE VIAL 1MG/ML VHA
00029414901	KYTRIL INJ SINGLE DOSE VIAL 1MG/ML
00173026010	LANOXIN INJ 0.5MG -PART 1.00
00173026035	LANOXIN INJ 0.5MG 2ML 50S
00173026210	LANOXIN INJ PEDIATRIC 0.1MG/ML
00173026015	LANOXIN INJECTION -PART 1.00
00173026055	LANOXIN INJECTION -PART 1.00
00173071325	MYLERAN TAB 2MG 25S
00173065601	NAVELBINE INJ 10MG 1ML
00173065644	NAVELBINE INJ 50MG 5ML
00173010793	RETROVIR IV INF 10MG/ML 20ML 10
00173041900	VENTOLIN NEB SOL INH 0.083% 3ML 25S
00173041901	VENTOLIN NEB SOL INH 0.083% 3ML 5S S
00173038501	VENTOLIN SOL INH 0.5% 5MG/ML 10ML
00173038558	VENTOLIN SOL INH 0.5% 5MG/ML 20ML
00173044200	ZOFRAN INJ 2MG/ML 20ML
00173044202	ZOFRAN INJ 2MG/ML 2ML 5S
00173046100	ZOFRAN INJ PRMXD 32MG/50ML
00173046200	ZOFRAN INJ PRMXD 4MG/50ML
00173056900	ZOFRAN ODT 4MG 5X2 30S
00173057004	ZOFRAN ODT 8MG 5X2 10'S
00173057000	ZOFRAN ODT 8MG 5X2 30S
00173048900	ZOFRAN ORAL SOL 4MG/5ML 50ML
00173068000	ZOFRAN TAB 24MG 1S
00173044601	ZOFRAN TAB 4MG 100S
00173044602	ZOFRAN TAB 4MG 100S UD
00173044600	ZOFRAN TAB 4MG 30S
00173044604	ZOFRAN TAB 4MG 3S
00173044701	ZOFRAN TAB 8MG 100S
00173044702	ZOFRAN TAB 8MG 100S UD
00173044700	ZOFRAN TAB 8MG 30S
00173044704	ZOFRAN TAB 8MG 3S
00173095201	ZOVIRAX FOR INJECTION 1000MG 20ML 10S (C
00173099501	ZOVIRAX FOR INJECTION 500MG 10ML 10S (C#

J&J NDC List

NDC	Description
57894003001	C168J REMICADE 1PCK
59676031201	PROCRIT 10,000 U/ML
59676031002	PROCRIT 10000 U
59676031001	PROCRIT 10000 U/ML
00062740103	PROCRIT 10000U/ML AMG
59676032001	PROCRIT 20,000 U/ML
59676030202	PROCRIT 2000 U/
59676030201	PROCRIT 2000 U/ML 6
00062740201	PROCRIT 2000U/ML AMG
59676030302	PROCRIT 3000 U/
59676030301	PROCRIT 3000 U/ML 6
00062740503	PROCRIT 3000 U/ML INST
00062740501	PROCRIT 3000U/ML AMG
59676030402	PROCRIT 4000 U/
59676030401	PROCRIT 4000 U/ML 6
00062740004	PROCRIT 4000 U/ML INST
59676034001	PROCRIT 40000 U/ML
00062740003	PROCRIT 4000U/ML AMG

SP NDC List

NDC	Description
59930151504	ALBUTEROL INHALATION SOLUTION
59930164702	ALBUTEROL INHALATION SOLUTION
59930150006	ALBUTEROL SULFATE INHAL. SOL.
59930150008	ALBUTEROL SULFATE INHAL. SOL.
59930151701	ALBUTEROL SULFATE SOLUTION
59930151702	ALBUTEROL SULFATE SOLUTION
59930155020	ALBUTEROL SULFATE SOLUTION
00085113601	INTEGRILIN
00085117701	INTEGRILIN
00085117702	INTEGRILIN
00085123501	INTRON A FOR INJ MULTIDOSE PEN
00085124201	INTRON A FOR INJ MULTIDOSE PEN
00085125401	INTRON A FOR INJ MULTIDOSE PEN
00085116801	INTRON A INJ 18MIU HSA FREE
00085113301	INTRON A INJ 25MIU HSA FREE
00085118401	INTRON A INJ 3MIU HSA FREE
00085118402	INTRON A INJ 3MIU HSA FREE
00085119101	INTRON A INJ 5MIU HSA FREE
00085119102	INTRON A INJ 5MIU HSA FREE
00085117901	INTRON A INJ PAK10MIU HSA FREE
00085117902	INTRON A INJ PAK10MIU HSA FREE
00085057102	INTRON A INJECTABLE 10MILLN IU
00085057106	INTRON A INJECTABLE 10MILLN IU
00085111001	INTRON A INJECTABLE 18MILLN IU
00085028502	INTRON A INJECTABLE 25MILLN IU
00085064703	INTRON A INJECTABLE 3MILLN IU
00085064704	INTRON A INJECTABLE 3MILLN IU
00085064705	INTRON A INJECTABLE 3MILLN IU
00085012002	INTRON A INJECTABLE 5 MILLN IU
00085012003	INTRON A INJECTABLE 5 MILLN IU
00085012004	INTRON A INJECTABLE 5 MILLN IU
00085012005	INTRON A INJECTABLE 5 MILLN IU
00085053901	INTRON A INJECTABLE 50MILLN IU
00085068901	INTRON A INJECTION 18 MIU
00085092301	INTRON A SOL FOR INJ 10 MILLI
00085076901	INTRON A SOL. FOR INJ. 25MILLN
00085095301	INTRON A SOLUTION 18MIU 3ML
59930160001	PERPHENAZINE
59930160002	PERPHENAZINE
59930161001	PERPHENAZINE 16MG
59930160501	PERPHENAZINE 8MG
59930160502	PERPHENAZINE 8MG
59930160301	PERPHENAZINE TABLETS
59930160302	PERPHENAZINE TABLETS
00085133601	PROVENTIL INHALATION SOLUTION
00085020901	PROVENTIL SOLUTION .083MG/ML
00085180601	PROVENTIL SOLUTION .083MG/ML
00085020802	PROVENTIL SOLUTION 5MG/ML

00085020852	PROVENTIL SOLUTION 5MG/ML
00085125901	TEMODAR 100MG
00085125902	TEMODAR 100MG
00085124401	TEMODAR 20MG
00085124402	TEMODAR 20MG
00085125201	TEMODAR 250MG
00085125202	TEMODAR 250MG
00085124801	TEMODAR 5MG
00085124802	TEMODAR 5MG